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NO. 87-128

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

VS.

THE TEXAS WATER DEVELOPMENT BOARD,
THE ATTORNEY GENERAL OF TEXAS, AND
THE STATE OF TEXAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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September, 1987

RESPONDENTS PRESENT SUBSIDIARY QUESTION

The question presented by the Respondents can be deemed a subsidiary question fairly included within the question presented by the Petitioner.

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PETITIONER'S REPLY BRIEF

Pursuant to Rule 22.5 of this Court, your Petitioner respectfully submits this brief in reply to the arguments first raised in Respondents' Brief in Opposition. Citations to the original record (O.R.) are only to those of the Complaint as stated in the Petition, p. 5.

RESPONDENTS ERR IN STATING THE CASE

Respondents' history of prior suits has no relevance to the case at bar since they occurred prior to the adoption of House Concurrent Resolution No. 106 by which Petitioner was granted consent to sue the Respondents (O.R. 741). Without this consent of the State, the jurisdictional bar of the Eleventh Amendment was the rationale by which the court dismissed the Texas Water Development Board (TWDB) for lack of jurisdiction. This bar has now been removed, Restatement Second of Judgments, 1982, Section 26.

Respondents err in their attempt to cast conspiracy as a basis for the case at bar. Conspiracy is nowhere alleged.[1] Since the decisions in the previous federal case

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[1] The opinion below of the United States Court of Appeals for the Fifth Circuit is also in error by stating that "Postel alleges . . . the defendants have conspired" (Petition, pp. B-3,4).

held that there was no evidence of a conspiracy (Petition, p. B-3) and none is presently alleged, conspiracy is a dead issue. However, Respondents would revive this issue as an alternative ground for this Court's affirmance pursuant to the bar of collateral estoppel or issue preclusion.[2] (See Respondents' Brief, p. 2, n. 1)

Although Respondents would have this Court believe that Petitioner alleges he was maligned for expressing his opposition

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[2] Not only would collateral estoppel fail as a bar, but Respondents' other alternative grounds of res judicata and limitation would also fail because the previous dismissal of the TWDB for lack of jurisdiction is an exception to claim preclusion, Restatement Second of Judgments, 1982, Section 20; and limitation tolls. Furthermore, the prosecutorial immunity claimed for the Attorney General has been specifically forgone by H.C.R. No. 106. Abstention is not warranted under the Pullman doctrine because there is warrant in state law for Respondents' actions (which abrogate the Texas Constitution), and Burford-type abstention is not available because the criteria for equitable discretion are wanting -- both more fully developed in Petitioner's reply brief below.

to the Texas Water Plan, in truth he alleges that he was maligned for expressing his opposition to proposed amendments to the Texas Constitution that would have implemented the Plan (O.R. 646-47, 734-36bis). That opposition, Respondents concede, was based upon what he continues to allege is the extraconstitutional manner in which the TWDB administers the Water Development Fund -- an allegation that "must be taken as true" by a court in its review, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and one among others that tolls limitation.

RESPONDENTS' SUMMARY OF ARGUMENT IS NOT SINCERE

As an attorney for Respondents, the Attorney General of Texas, a Respondent in his official capacity, argues not from conviction but only for convenience that "claims under the Guaranty Clause are nonjusticiable". In State of Texas v. United States, 730 F.2d 339, 358 (5th Cir. 1984),

this same Attorney General devoted 30% of his brief to the justiciability of his claim that the Staggers Act violates the Guaranty Clause. Petitioner moved to incorporate this brief on former appeal under FRAP Loc.R. 27.1.10, but it was denied in error as a motion to supplement the record under Loc.R. 27.1.8. Certainly, the "highly imaginative" argument, Id., at 358 of this brief is not that of Petitioner, but it argues the justiciability of the Guaranty Clause, and now the Attorney General would foreclose Petitioner with his inconsistency and the error below.

I THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Respondents contend that there are no special and important reasons for granting the petition for a writ of certiorari because the "decisions of the courts below fit none of the measures of character set out in Sup. Ct. R. 17.1". While this rule

provides that these measures of character neither control nor fully measure this Court's discretion, it should be noted that the decisions below did not address the abrogation of the Constitution of the State of Texas -- the sine qua non to the question presented in the Petition, to the issues presented in the briefs below and in the Complaint (O.R. 642,643,659-663,673, 673bis,684-685bis,686-690). Under Sup. Ct. R. 17.1(c), this question is "an important question of federal law (integral to the Guaranty Clause) which has not been, but should be, settled by this Court".

The question is without judicial precedent (Petition, pp. 13-14), so the courts below had no guidance by which to uphold the constitutional and republican form of state government that the Respondents are subverting with their abrogation of the Texas Constitution (Petition, pp. 5-12). With no other responsible federal

authority to uphold the republican form of state government in Texas (Petition, pp. 12-13), the federal question is substantial for the federal courts in that it is "the obligation of the United States" and "the duty of the United States" to guarantee a republican form of government to the people of Texas, Texas v. White, 74 U.S. 700, 727-729 (1868).

Respondents view the lower courts' mode of handling the case as other "indicia of lack of special or important reasons for granting certiorari" (p. 3). This view has no relevance to the grant of certiorari because the lower courts mode of handling the case was circumscribed by the precedent of previous Guaranty Clause claims and the lack of precedent when confronted with such claims based on constitutional abrogation.

The question presented in the Petition is integral to the responsibility of

the federal courts under the Guaranty Clause. It has not been settled, but it should be settled by this Court. Therefore, there are special and important reasons for granting the writ of certiorari.

II RESPONDENTS DISSEMBLE BY FALSE REPRESENTATION

Respondent Attorney General of Texas again dissembles his own convictions about the Guaranty Clause (pp. 4-5 supra) by the false representation that a student note sparked Petitioner's suit. It is an existing fact that Petitioner made a one line reference to this note in a brief below, but there is no evidence that it sparked his suit; whereas there is considerable evidence that the abrogation of the Texas Constitution continues and prompted his opposition to the adoption of proposed constitutional amendments for which he was subjected to an official state governmental attack which maligned and injured.

These are the facts which "sparked" this suit, and not the Attorney General's false representation which is merely calculated to deceive.

II-A THE CURRENCY OF THE "JUDICIAL MYTH"

Respondents fail to recognize that the "judicial myth" is not the "long and unbroken line of Supreme Court cases extending back to 1849 and the decision in Luther v. Borden, 7 How. 1 (1849)" (p. 3). Rather, it is the prevailing false notion, held uncritically by the legal profession, that the adjudication of those claims has been converted into an immutable holding that the Guaranty Clause itself has an intrinsic, nonjusticiable, political question bias. Since this Court has not so held nor could it so hold because the future cannot be foretold, the currency of this bias is a "judicial myth".

Respondents err by stating that Peti-

tioner "lifts from Baker, 369 U.S. at 217" (p. 3) criteria other than those derived from analyses of Guaranty Clause claims. Baker v. Carr analyses of Guaranty Clause claims, Id. at 218-226, are fully examined in the Petition, pp. 21-26, and the case of Taylor & Marshall v. Beckham, 178 U.S. 548 (1900), analyzed in Baker and again by the Respondents (p. 4), is shown to be one from which the case at bar is clearly distinguished (Petition, p. 26).

The cases collected in Baker have no precedential value for the suit at bar. Respondents' suggestion that they need to be overruled to grant the writ reflects the currency of the "judicial myth". These cases need not be overruled since they dealt not with constitutional abrogation, and because the instant case is clearly distinguished in all respects from that line of cases (See Petition, pp. 23-26).

II-B THE DICTATES OF WISDOM ARE OTHER THAN THOSE ADVANCED BY RESPONDENTS

1. States cannot always be their own best judge. Respondents advance the "notion that the states, as sovereigns, are the best arbiters of their own laws and constitutions" (p. 4). However, constitutions limit government as well as establish government (Complaint, O.R. 670), and expansion, not limitation, is their natural tendency. Although it must be taken as true that the TWDB has expanded outside the limits of the Texas Constitution and abrogated its provisions (Petition, pp. 5-12); no authority in Texas has enforced constitutional limits on this state agency. On the contrary, legislative, judicial and executive branches of Texas government have all accommodated the expansion of the TWDB outside the limits of the Texas Constitution (O.R. 642,643,652,657,659,661,662,664, 673bis,679,683bis,684-85,687-690,701,715).

Because the coordinate branches of the federal government take no hand in the matter (Petition, pp. 12-13), the federal courts and the Guaranty Clause are particularly well suited to meet the responsibility of the United States to uphold the republican form of state government in Texas. Extensive discovery has already produced the evidence by which Petitioner will be able to establish the truth of his allegations in Federal District Court.

2. Respondents' in terrorem argument (p. 5) that "Petitioner's argued-for Guaranty Clause cause of action would . . . impose federal judicial review of all state action for conformity with state constitutional law." is a non sequitur. The argument must presuppose the impossible condition that all state action would cause an alleged injury from constitutional abrogation for which redress would be sought in federal court. The argument has no merit.

3. Respondents err by refuting the control of the Texas Constitution over state conduct. Such an argument by the State would, if sustained, subvert its republican form of government.

In the United States, a universal standard of a republican form of state government is a written constitution as the foundation of that governmental form (Petition, pp. 29-30). Petitioner contends that the abrogation of the Constitution of the State of Texas subverts its republican form of government, violates that standard and thereby violates the Guaranty Clause. Respondents assert that such a standard:

> ". . cannot be a federal standard for determining whether the Clause has been violated because its parameters are controlled solely by the state, and those parameters can be as easily changed by conforming state law to state conduct (i.e., amending the state constitution) as by conforming state conduct to state law." (p.5)(emphasis supplied).

"In either case (Respondents continue),

the state action remains the same, yet Petitioner would contend that one violates the federal standard while the other does not." Petitioner does, indeed, so contend.

The Respondents have here capsuled the essence of the controversy by asserting, if effect, the legitimacy of constitutional abrogation (state conduct) because the state constitution can be amended to conform to state conduct. This argument is illimitable. If sustained, it would enable the State to run free of constitutional restraints and limitations. Even the defeat of a proposed constitutional amendment to legitimate state conduct would not alter illegitimate conduct as in the case at bar (O.R. 658,660-662,678bis, 686-690,701,704,706-713bis).

Since the State of Texas will not, and feels free not to, conform to the will of its voters as that will is democratically expressed in elections for the adop-

tion of amendments to its Constitution, a federal standard of constitutional conformity is essential for the United States to meet its responsibility under the Guaranty Clause. Because the coordinate branches will not act (Petition, pp. 12-13,30-31), this standard will enable this Court to meet the obligation and duty of the United States to guarantee a republican form of government to the people of Texas, Texas v. White, 74 U.S. 700, 727-729.

Respondents contend that such a standard "could stifle the states' traditional role as the 'laboratories of democracy' and impose a federal straitjacket over the diverse forms of state government" (p. 5). Petitioner contends that the state's role, in its attack on Petitioner and in subverting the will of the voters (pp. O.R. supra), has been antagonistic to democracy; and the Texas Legislature itself has found that the role played by Respondent

TWDB "is abhorrent to the democratic process", H.C.R. No. 106 (O.R. 741).

Furthermore, a federal standard of constitutional conformity would not inhibit "the legislative branches of the people themselves to determine what particular forms their republican governments take.", as Respondents contend (p. 5), because such a standard would look only to the conduct of that government.

4. Respondents err by resurrecting the bar of the Eleventh Amendment so as to assert a bar against noninvolved pendent jurisdiction. They assert that it would be impossible to reconcile federal jurisdiction for Guaranty Clause claims with the Eleventh Amendment's bar "for state law violations appended to properly raised federal claims" (p. 6) as this Court held in Pennhurst State School and Hospital v. Halderman (Pennhurst II), 465 U.S. 89 (1984). It is, of course, a fact that the

case at bar involves no pendent jurisdiction, and the Eleventh Amendment bar has been foregone by H.C.R. No. 106 (pp. 2,3 supra), but more to Respondents' point is the fact that jurisdiction under the Guaranty Clause goes to the abrogation of a state's constitution, the very foundation of its republican form of government, and the ruling in Pennhurst concerns only state law violations. This is not to disparage state law but to highlight the integral and fundamental role of a state's constitution in its republican form of government; and, as such, the inseparability of fidelity to a state's constitution and the guaranty of republican government in the United States Constitution.

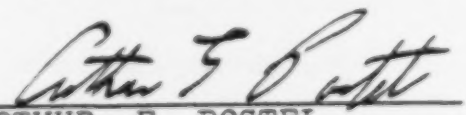
5. Respondents' feigned umbrage that "a Guaranty Clause cause of action is unnecessary and is also insulting to the judiciary of Texas"(p.6) merely dissembles the reality of power in Texas. That power, or

"faction" to use Madison's term (Petition, p.34), has its interests served by water development, and will abrogate the Texas Constitution to serve that end. Given this "faction", it is beyond reason to expect that a state court could supply relief.

CONCLUSION

Respondents abrogate the Texas Constitution, grant themselves that right (pp.13-14 supra), and reserve the right to do nothing about it (Brief, p.6). Such abrogation clearly subverts the republican form of Texas government, and violates the Guaranty Clause. Because the issues are important and without precedent, the Petition should be granted.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

The State of Texas §
§
County of Bexar §

Before me, the undersigned Notary Public in and for Bexar County, Texas, on this day personally appeared ARTHUR E. POSTEL, who being by me duly sworn, upon oath stated: I, ARTHUR E. POSTEL, am the Petitioner herein, and on the 17th day of September, 1987, I served copies of the foregoing Petitioner's Reply Brief on the Respondents in compliance with Rule 28.3 by sending 3 copies by Certified Mail, Return Receipt Requested, postage prepaid, to the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711-2548. All parties required to be served have been served.

Arthur E. Postel
ARTHUR E. POSTEL

SUBSCRIBED AND SWORN to before me by the said ARTHUR E. POSTEL, on this the 17 day of September, 1987.

Lynda Hubbard
LYNDA HUBBARD
Notary Public, State of Texas
My commission expires 11/18/88